

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

(1) NATIONAL LABOR RELATIONS BOARD,

Applicant

v.

Case No. 16-mc-00019-GKF

(1) INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 627

Respondent

APPLICATION OF THE NATIONAL LABOR RELATIONS BOARD FOR ORDER
ENFORCING SUBPOENA DUCES TECUM

The National Labor Relations Board (the “Board”), an administrative agency of the Federal Government, respectfully applies to this Court for an order compelling compliance with an investigative subpoena issued to the International Union of Operating Engineers, Local 627 (“IUOE Local 627” or “Respondent”) and duly served on IUOE Local 627 in the manner provided by law. This application, which is accompanied by a supporting memorandum, is made under Section 11(2) of the National Labor Relations Act, as amended (the “Act”), 29 U.S.C. § 161(2). In support of its application, upon information and belief, the Board states as follows:

1. The Board is an administrative agency of the United States Government created by the Act, and empowered to administer the provisions of the Act, including the issuance of subpoenas in furtherance of its investigation of matters within its jurisdiction. 29 U.S.C. §§ 153(a), 160(a), 161(1). Section 11(2) of the Act, *supra*, confers jurisdiction upon the United States district courts, upon application of the Board, to order compliance with those subpoenas and to impose contempt sanctions for continued noncompliance.

2. Respondent IUOE Local 627 is a labor organization that deals primarily in the construction industry and maintains an office at 12109 E Skelly Dr., Tulsa, OK 74128, an

address within this judicial district. Respondent runs exclusive hiring halls in both Tulsa and Oklahoma City, which employers who are signatory to collective-bargaining agreements with Respondent are required to utilize for specific hiring needs. In order to facilitate the exclusive hiring hall, the Respondent maintains an out-of-work referral list to determine which union members are not working and thus may be referred to a job.

3. On April 12, 2013, the Board issued a Decision and Order (reported at 359 NLRB No. 91 and attached as Exhibit A) finding that the Respondent violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. § 158(b)(1)(A), (b)(2), by denying Charging Party (and discriminatee) Stacy M. Loerwald's requests to examine the exclusive hiring hall out-of-work referral list, removing her from that list and refusing to allow her to re-register, and refusing to stamp her Oklahoma Employment Security Commission unemployment work search book. The Board panel that issued the 2013 Board Order consisted of Chairman Mark Gaston Pearce and Members Richard F. Griffin, Jr. and Sharon Block. Members Griffin and Block had received recess appointments to the Board in January 2012.

4. The Respondent filed a petition for review of the 2013 Board Order in the United States Court of Appeals for the Tenth Circuit (No. 13-9547), and the Board filed a cross-application for enforcement of its order (No. 13-9564). The Court consolidated the proceedings and held the case in abeyance pending the Supreme Court's decision in *Noel Canning v. NLRB*, 134 S. Ct. 2250 (2014). On June 26, 2014, the Supreme Court issued its decision in *Noel Canning* and held that the President's recess appointments to the Board in January 2012 did not comply with the Recess Appointments Clause. Pursuant to this decision, the Tenth Circuit remanded the 2013 Board Order to the Board.

5. On November 5, 2014, a properly-constituted Board panel consisting of three Senate-confirmed members issued a Decision and Order incorporating by reference the 2013 Decision and Order (reported at 361 NLRB No. 93 and attached as Exhibit B). To remedy the violations committed by Respondent, the 2014 Board Order required Respondent to: (1) grant Ms. Loerwald's requests to examine the out-of-work referral list; (2) restore Ms. Loerwald to the out-of-work referral list in her rightful order of priority; (3) make Ms. Loerwald whole for any loss of earnings and other benefits suffered as a result of the discrimination against her; (4) remove from its files any reference to Ms. Loerwald's removal from the out-of-work referral list and notify her of this action in writing, stating that her removal would not be used against her in any way; (5) provide the Board or its agents "all hiring-hall referral records, payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due" to Ms. Loerwald; (6) post, physically and electronically, the required Notice to Employees and Members; and (7) execute and return a sworn Certification of Compliance.

6. On November 20, 2014, Respondent petitioned for review of the 2014 Board Order in the United States Court of Appeals for the Tenth Circuit (No. 14-9605), and the Board cross-applied for enforcement of its order (No. 14-9613). On December 3, 2015, the Tenth Circuit enforced the 2014 Board Order. (Exhibit C). No timely petition for rehearing or petition for writ of certiorari was filed.

7. After the Tenth Circuit issued its Order and Judgment enforcing the 2014 Board Order, the Compliance Officer for the Board's Region 14 office sent a letter to Respondent on December 14, 2015, requesting that Respondent take steps to comply with the Judgment and

provide documents demonstrating compliance. (Exhibit D). On December 30, 2015, Respondent sent a packet containing the following documents (cover letter and items a-d below attached as Exhibit E):

- a. Certificate of Posting dated December 22, 2015 and signed by Respondent's president indicating that the Notice to Employees and Members produced in connection with the 2013 Board Decision was posted on April 23, 2013 in the Oklahoma City and Tulsa, OK Union Halls;
- b. Notice to Employees and Members bearing the heading "Posted by Order of the National Labor Relations Board," signed by Respondent's president and business agent and dated April 26, 2013;
- c. Certification of Compliance;
- d. Check to Ms. Loerwald for \$16,879.58;
- e. Article XVII of the applicable collective bargaining agreement, that sets forth wages and fringe benefits;
- f. Dispatch history by office for Oklahoma City and Tulsa, OK, for the periods 11/1/2011 through 12/31/2011, and 1/1/2012 through 8/15/2012;
- g. Work history for Ms. Loerwald;
- h. Dispatch history for Ms. Loerwald;
- i. Member qualifications form for Ms. Loerwald;
- j. Ms. Loerwald's Health and Welfare History for 2008-2015;
- k. Qualification list, dispatch history, work history and Health and Welfare reports for alleged comparators Steven Farell, Dustin L. Schultz, Jeffrey S. Nelson, David W. Church, Stuart W. Farris, Tifford M. Graham, and Douglas Hinkle.

8. In its submission, Respondent failed to include a copy of the required expunction letter. But Respondent did include a sworn Certification of Compliance stating at it had granted Ms. Loerwald's request to examine the out-of-work referral list in August 2012, expunged any record of Ms. Loerwald's removal from its files on December 23, 2015, and notified Ms. Loerwald that this had been done. However, the Board's regional office subsequently obtained evidence contradicting these claims.

9. On January 11, 2016, the Compliance Officer contacted Respondent's counsel by telephone to determine how Respondent had calculated backpay and what amounts Respondent had included in the tendered check. (Declaration of AnnG K. Wright, attached as Exhibit F). The Compliance Officer also advised Respondent that the Court's Judgment required it to post a Notice dated December 14, 2015, bearing the heading "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board." Respondent's counsel replied that Respondent had already posted a notice bearing a different heading in 2013.

10. On January 13, 2016, the Compliance Officer once again called Respondent's counsel for an explanation of Respondent's underlying calculations for the tendered backpay check and an explanation of what portions of the check were for amounts owed to benefit funds. After Respondent's counsel orally explained the calculations too quickly for the Compliance Officer to record, the Compliance Officer requested a written account. Respondent refused to provide a written account. Respondent also claimed that the tendered check included all amounts owed to benefit funds and that it owed no other amounts, such as amounts offsetting adverse tax consequences or amounts equaling an employer's contributions for Social Security and Medicare.

11. In letters dated January 21, 2016 (Exhibit G) and February 22, 2016 (Exhibit H), the Board recited these facts and notified Respondent of its noncompliance. The Board also returned the backpay check and requested proof that Respondent had fulfilled the affirmative provisions of the judgment. After Respondent failed to provide the information requested, the Board's Regional office recommended institution of contempt proceedings with the Board's Contempt, Compliance, and Special Litigation Branch ("CCSLB"). In a letter dated April 13, 2016 (Exhibit I), CCSLB informed Respondent of potential contempt proceedings absent compliance with the Tenth Circuit's judgment. Respondent did not reply in any way.

12. On May 17, 2016, CCSLB issued Subpoena Duces Tecum B-1-RIXX41 directing Respondent to respond to interrogatories and provide documents related to Respondent's compliance with the enforced Board Order. (Exhibit J). This subpoena was tendered for delivery to the address on record of Respondent by UPS overnight delivery. That package was delivered May 17, 2016 and signed for by "Davis." A courtesy copy of this subpoena was also sent to Respondent's counsel, Steve Hickman, by UPS overnight delivery and e-mail. That package was delivered May 17, 2016 and signed for by "Arrowsmith." (Exhibit K).

13. Pursuant to Section 102.31(b) of the Board's Rules and Regulations, 29 C.F.R. § 102.31(b), Respondent filed a Petition to Revoke the subpoena with the Board on May 23, 2016. (Exhibit L). On June 10, CCSLB filed an Opposition to the Petition to Revoke and referred it for ruling to the Board. (Exhibit M).

14. On August 10, 2016, the Board issued and served upon Respondent an order denying the Petition to Revoke except as to any material already provided by Respondent, provided that Respondent accurately describe which documents under subpoena had already been provided, state whether those documents constitute all of the requested documents, and

provide all of the information that was subpoenaed. (Exhibit N). Immediately thereafter, CCSLB attorney Molly G. Sykes wrote to counsel for Respondent and requested that IUOE Local 627 comply with the subpoena in conformity with the Board's order. (Exhibit O). Respondent did not respond in any way.

15. As noted previously, Section 11(2) of the Act specifically authorizes the Board to make an "application" to the district court for an order enforcing a Board subpoena. The Board's application is a dispositive matter, not a pre-trial civil discovery matter in district court. "It is significant that the statute calls for an 'application' rather than a petition, an 'order' rather than for a judgment, and that it details no other procedural steps." *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450, 451 (6th Cir. 1941).

16. Respondent's failure and refusal to produce any of the subpoenaed documents or respond to the interrogatories in compliance with the aforementioned subpoena duces tecum issued and served on Respondent has impeded and continues to impede the Board in its investigation of the matters before it and has prevented the Board from carrying out its duties and functions under the Act.

WHEREFORE the Applicant, National Labor Relations Board, respectfully prays that this Court enter an order forthwith:

(1) Requiring Respondent, within ten (10) calendar days of entry of the order, to fully comply with Subpoena Duces Tecum B-1-RIXX41, in accordance with the Board's order dated August 10, 2016; and

(2) Awarding the Applicant, National Labor Relations Board, its attorneys' fees and costs incurred in initiating and prosecuting this subpoena enforcement action; and

(3) Granting the Board such other and further relief as may be necessary and appropriate.

Respectfully submitted,

NATIONAL LABOR RELATIONS BOARD

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Contempt, Compliance and
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National Labor Relations Board
1015 Half St. SE
Washington, D.C. 20003

Dated: September 28, 2016
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the Board's attached Opposition to Respondent's Petition to Revoke Subpoena *Duces Tecum* was served by email and USPS mail on this 28th day of September, 2016 upon:

Frasier, Frasier & Hickman
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Tulsa, OK 74107-1730